STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 18, 2014
v	No. 309222 Oakland Circuit Court
EDWARD VERZEL DODSON, Defendant-Appellant.	LC No. 2011-237084-FC

Before: MURPHY, C.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant Edward Verzel Dodson appeals of right his jury convictions of armed robbery, MCL 750.529, and fourth-degree fleeing and eluding, MCL 257.602a(2). The trial court sentenced Dodson as a fourth habitual offender under MCL 769.12 to serve 25 to 60 years in prison for the armed robbery conviction and 2 to 15 years in prison for the fleeing and eluding conviction. Because we conclude there were no errors warranting relief, we affirm.

I. PROSECUTORIAL ERROR

Dodson first argues that the prosecutor erred and that the errors were so prejudicial that he is entitled to a new trial. This Court reviews claims of prosecutorial error to determine whether the prosecutor's conduct denied the defendant a "fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). However, because Dodson's lawyer did not object at trial, our review is limited to plain error. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Further, where the trial court could have cured the prejudice with a timely instruction, this Court will not reverse. *Id.*

Dodson argues that the prosecutor first erred by presenting testimony that there was a lawyer present at his pretrial lineup. Examining the record as a whole and looking at the prosecutor's questions and remarks in context, see *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003), it is evident that the prosecutor did not improperly denigrate Dodson's constitutional right to have a lawyer or improperly suggest that Dodson's exercise of his rights was indicative of guilt. Here, the primary issue at trial was whether Dodson committed the robbery at issue or whether some other man stole his motorcycle and committed the robbery. Because identity was clearly the primary issue, the prosecutor plainly wanted to show that the officers used a fair lineup procedure when the victim identified Dodson as the man who robbed her. Accordingly, the prosecutor's decision to elicit testimony concerning the fairness of the

identification was not improper. In any event, any minimal prejudice was alleviated by the court's instruction that lawyers' statements, arguments, and questions are not evidence. *Unger*, 278 Mich App at 235.

We likewise reject Dodson's claim that the prosecutor improperly argued facts not in evidence by stating that a lawyer was present to ensure the lineup was fair. "Although a prosecutor may not argue facts not in evidence or mischaracterize the evidence presented, the prosecutor may argue reasonable inferences from the evidence." *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). The detective who conducted the lineup testified without objection that a lawyer was present at the lineup to protect the rights of the lineup participants. Thus, the prosecutor had factual support for the comments. See *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004).

Dodson next claims that the prosecutor made an improper appeal to civic duty by remarking on Dodson's mother's decision to allow her jazz club to share alcohol with a strip club. "[P]rosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jury members." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). "[I]t is improper for a prosecutor to appeal to the jury's civic duty by injecting issues broader than guilt or innocence or encouraging jurors to suspend their powers of judgment." *Thomas*, 260 Mich App at 455-456. Dodson characterizes the prosecutor's remarks as an appeal for the jury to "conclude that either the defendant's mother, who was his alibi witness, or the defendant himself owned a strip club or engaged in an illegal business practice when they fronted liquor" to the strip club; he claims that these comments were an attempt to convert the trial "into a referendum on the propriety of strip clubs and on alcohol sales."

The prosecutor did not directly plead with or encourage the jury to go outside the evidence and convict Dodson on the basis of his or his mother's association with the strip club or their arrangement for sharing or loaning alcohol between the clubs. Cf. *People v Williams*, 65 Mich App 753, 755-756; 238 NW2d 186 (1975). The prosecutor did not inject issues broader than the defendant's guilt or innocence or encourage the jurors to suspend their powers of judgment and convict based on their fears and prejudice regarding strip clubs and alcohol. *Bahoda*, 448 Mich at 282-283. The prosecutor's brief comment on the arrangement that Dodson's mother had was not improper and, in any event, any prejudice could have been cured by an instruction. *Unger*, 278 Mich App at 235.

Dodson also contends that the prosecutor impermissibly attacked his character by offering into evidence a paycheck stub showing that he made only $16 per hour, a bank statement indicating savings of approximately $30,000, and evidence that he owned a Jeep and a motorcycle. Specifically, he maintains that the prosecutor presented this evidence to encourage the jury to improperly infer that his pay rate did not support his lifestyle so that the jury would "conclude that [his] savings were ill-gotten, perhaps by robbing women in parking lots." See MRE 404(a); *People v Starr*, 457 Mich 490, 494-495; 577 NW2d 673 (1998). It is evident that the prosecutor properly presented the documents to establish the location of Dodson's residence and his ownership of the motorcycle involved in the robbery. And the trial court did not err by admitting the documents. The prosecutor could properly submit documentation to establish Dodson's residence at the house where his motorcycle was registered because that evidence made it more likely that he was the man who used the motorcycle during the robbery at issue.

See MRE 401; MRE 402. Moreover, Dodson's lawyer himself used the bank statement in his opening and closing argument to show that Dodson lacked a motive to commit the robbery. Accordingly, given the evidence and taken in context, the prosecutor's isolated remark that Dodson "must be one of the world's best savers" did not amount to error warranting relief.

Dodson similarly argues that the prosecutor erred by trying to elicit testimony about Dodson's criminal record. Evidence of prior convictions is generally inadmissible. MRE 404(b); *People v Spencer*, 130 Mich App 527, 537; 343 NW2d 607 (1983). While it is true that the prosecutor questioned Dodson's mother about where he lived during the six months before he lived with her, the prosecutor did not ask about Dodson's criminal history and did not imply that he had been imprisoned or previously convicted of a crime. Further, the prosecutor's reference to the fact that Dodson's mother did not know where he previously lived was not improper; the prosecutor did not refer to Dodson's imprisonment or comment on his record. *Bahoda*, 448 Mich at 282. Regardless, the trial court's instruction that the jury must decide its case based only the evidence and that statements and arguments of lawyers are not evidence sufficiently cured any prejudice. *Unger*, 278 Mich App at 235.

Dodson also argues that the prosecutor vouched for a detective's credibility by agreeing that it was difficult to find lineup participants of the same weight and height for a lineup. The prosecutor's agreement did not amount to a statement that he had special knowledge that the detective was telling the truth. See *Bahoda*, 448 Mich at 276. Consequently, it did not amount to vouching.

Dodson also argues that the prosecutor improperly argued facts that were unsupported by the evidence when he told the jury that the officers who conducted surveillance on Dodson's home shortly after the robbery did not knock on the door due to their fear of a dangerous confrontation. The prosecutor plainly erred in making this argument because the testimony was that the officers did not knock because they did not want to alert relatives, friends, or neighbors that they were looking for Dodson. *Id.* at 282. The prosecutor's misstatement, however, did not amount to outcome determinative error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The statement was isolated and brief and the reason for the officers' decision not to knock was not a critical fact. Further, although Dodson argues that the statement was prejudicial because it "called for the jury to speculate that [he] was a dangerous man and asked them to sympathize with police officers," the violent and dangerous nature of the assailant—robbing the victim at gunpoint—could certainly be inferred by the facts of the crime itself. Moreover, the trial court instructed the jury that statements and arguments by the lawyers are not evidence. *Unger*, 278 Mich App at 235.

Dodson argues too that it was improper for the prosecutor to state that he was guilty without qualifying that statement as a belief premised on the evidence. This, he maintains, impermissibly diluted the prosecutor's burden of proof and his presumption of innocence. Evaluating the prosecutor's statement in context, *Callon*, 256 Mich App at 330, the prosecutor adequately stated the appropriate evidentiary burden. Moreover, the trial court instructed the jury regarding the appropriate burden of proof and jurors are presumed to follow the court's instructions. *Unger*, 278 Mich App at 237. There was no error.

Dodson's final allegation of prosecutorial error is that the prosecutor improperly appealed to the jury to sympathize with the victim by highlighting her fear during the robbery. "[A]ppeals to the jury to sympathize with the victim constitute improper argument." *Watson*, 245 Mich App at 591. We do not agree that the prosecutor improperly asked the jury to sympathize with the victim.

There was evidence that the victim had been previously robbed and that she was terrified during the robbery at issue. On the basis of that evidence, the prosecutor remarked: "I can't think of anything more scary, once, let alone having it happen twice in a lifetime." When read in context, the prosecutor was not asking the jury to convict on the basis of sympathy for the victim, but was merely commenting on the facts and the witness' testimony. Regardless, any prejudicial effect of the remarks was minimal considering the isolated nature of the remark, that the prosecutor did not "blatantly appeal" to the jury's sympathy, and the fact that the victim was scared during the robbery was clearly already before the jury. *Watson*, 245 Mich App at 591. In fact, Dodson's lawyer referred to the victim's fear and argued that it likely impacted the reliability of her identification. Finally, any prejudicial effect was cured by the trial court's cautionary instruction that, "[y]ou must not let sympathy, [or] prejudice influence your decision in this case, in any way." *Unger*, 278 Mich App at 237.

There were no prosecutorial errors warranting relief.

II. SUGGESTIVE LINEUP

Dodson next claims that the admission of the victim's identification testimony violated his right to a fair trial because the pretrial lineup was impermissibly suggestive and the victim had no independent basis from which to identify him at trial. Dodson did not challenge the lineup procedure as unduly suggestive before the trial court; accordingly, we shall review the claim for plain error. See *People v Daniels*, 163 Mich App 703, 710-711; 415 NW2d 282 (1987); *Carines*, 460 Mich at 763. We review de novo claims of constitutional error. *People v Geno*, 261 Mich App 624, 627; 683 NW2d 687 (2004).

"A lineup can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). "In order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993) (opinion by GRIFFIN, J.). "If the trial court finds that the pretrial procedure was impermissibly suggestive, testimony concerning that identification is inadmissible at trial." *Id.* at 303. "However, in-court identification by the same witness still may be allowed if an independent basis for in-court identification can be established that is untainted by the suggestive pretrial procedure." *Id.*; *People v Williams*, 244 Mich App 533, 542-543; 624 NW2d 575 (2001). Where, as in this case, counsel was present at the lineup, the defendant bears the burden of showing that the lineup was impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996) (citations omitted).

A witness's identification of a defendant is the product of an impermissibly suggestive lineup identification where the differences in the individuals in the lineup "led to a substantial likelihood of misidentification." *Kurylczyk*, 433 Mich at 305. "The relevant inquiry, therefore, is not whether the lineup . . . was suggestive, but whether it was unduly suggestive in light of all of the circumstances surrounding the identification." *Id.* at 306. "When examining the totality of the circumstances, courts look at a variety of factors to determine the likelihood of misidentification":

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. [*Id.*, quoting *Neil v Biggers*, 409 US 188, 199-200; 93 S Ct 375; 34 L Ed 2d 401 (1972).]

Dodson primarily argues that the lineup was impermissibly suggestive because he was the only participant matching the physical description provided by the victim. Specifically, he was the only participant with "unusually large eyes" who matched the description of the perpetrator's height and weight. Generally, physical differences between the defendant and the other participants in the lineup will not, in and of themselves, constitute impermissible suggestiveness. *Kurylczyk*, 433 Mich at 304-305, 312. Rather, "[d]ifferences among participants in a lineup 'are significant only to the extent they are apparent to the witness and substantially distinguish [the] defendant from the other participants in the lineup. . . . It is then that there exists a substantial likelihood that the differences among line-up participants, rather than recognition of [the] defendant, was the basis of the witness' identification.'" *Kurylczyk*, 433 Mich at 312 (citation omitted).

Our review of the photograph of the actual lineup, which was admitted into evidence and accurately reflects the lineup at issue, does not reveal significant differences in the participants' physical characteristics "substantially distinguishing" Dodson so as to create a substantial likelihood of misidentification. *Kurylczyk*, 433 Mich at 305-306, 311-312. The lineup was comprised of five participants, including Dodson, all of whom were black males. Although there are slight discrepancies in age, height, and weight, the other participants generally resembled Dodson—they were all of the same race, appear to be similar in age, height, and weight, all have hair and facial hair, all have thin moustaches, and all are wearing identical clothing, i.e., blue jumpsuits and white wristbands so there were no distinguishing external features. Notably, and contrary to Dodson's argument on appeal, Dodson's eyes do not appear to be "unusually large" or significantly larger than the other lineup participants so as to "substantially distinguish" him from the others. *Id.* at 306, 312. There is also nothing in the record to indicate that the victim "singled out defendant because his physical characteristics differed markedly from those of the other participants." *Hornsby*, 251 Mich App at 467. The victim did not testify about her impressions of the differences in the appearances of the lineup participants. Instead, she testified that she knew as soon as Dodson walked into the room that he was the perpetrator, which strongly suggests that her identification had nothing to do with distinguishing characteristics between him and the other participants. *Kurylczyk*, 443 Mich at 304-306, 311-312.

Furthermore, the circumstances surrounding the lineup, including the victim's opportunity to view her perpetrator during the crime, her apparent degree of attentiveness in observing the perpetrator, the accuracy of the victim's prior description, the short time between the robbery and the lineup, and the victim's strong level of certainty demonstrated at the lineup, do not suggest a misidentification. *Id.* at 306. Although the robbery occurred at night and the victim only viewed her perpetrator for about two minutes, she testified that she had "no trouble" observing the perpetrator's face during the robbery, which occurred in the parking lot of her apartment complex with "good," "sufficient" lighting; she was able to see his eyes and "got a good look in them and at them," and she was in close proximity to him. The victim's testimony also indicated that she had a high degree of attentiveness during the robbery as evidenced by her fairly detailed description as well as her testimony that, as an owner of a party store who has been a victim of a robbery before, she is especially attuned to observing people. The victim's previous description of the perpetrator as in his late 30's or early 40's, 5'8"-5'10" tall, and weighing 160 to 190 pounds, with "larger than normal" eyes and a wider than normal nose is fairly accurate of and generally fits Dodson's actual appearance; he was 43 years old, 5'8" tall, and weighed 185 pounds and did not have small eyes or a narrow nose. *Id.* at 313. The victim also demonstrated a very high level of certainty in her identification: she knew who robbed her "as soon as" Dodson walked into the room, did not waiver, and had "no doubt" that the man who robbed her was Dodson. Finally, the lineup was only two days after the robbery, which further supports that her identification was reliable.

Additionally, there is nothing indicating that the conduct of the lineup procedure was impermissibly suggestive. *Hornsby*, 251 Mich App at 467. To the contrary, the victim was never told that a possible suspect was in the lineup or that anyone had been arrested and officers present at the lineup did not prompt the victim to make an identification, and instead said "nothing." A lawyer was also assigned and present during the lineup to protect the rights of the participants and there is no evidence that the attorney objected to the makeup of the lineup.

Dodson nevertheless contends that the lineup procedure was impermissibly suggestive because the participants did not appear at the same time, but walked into the room one at a time, and the victim identified him as the perpetrator after observing only two other men before him. Although the victim recognized Dodson as he walked into the room, the record clearly indicates that she looked at all of the participants and did not identify him as the perpetrator until after all of the participants were in the room, came to a complete stop, turned and faced the victim, and the lineup was finished.

Dodson next argues that the trial court should have used a double blind procedure for the lineup. To support his argument, Dodson cites *State v Henderson*, 208 NJ 208; 27 A3d 872, 896 (NJ Sup Ct, 2011), for the proposition that "the failure to perform blind lineup procedures can increase the likelihood of misidentification." *Henderson*, 27 A3d at 896-897. Here, the detective involved in the investigation arranged for and was present for the lineup, which arguably could have increased the risk of misidentification as explained in *Henderson*. However, Dodson does not allege that the officers or anyone else present at the lineup actually influenced the victim's identification decision in any way, nor does the record suggest how or if the identification procedure was tainted by the presence of the officers during the lineup. In fact, testimony suggests that the officers remained neutral during the lineup procedure in that they never told the victim that there was a possible suspect in the lineup or that anyone had been

arrested and did not prompt the victim to make an identification, instead saying nothing. Further, as previously mentioned, a lawyer was assigned and present during the lineup to protect the rights of the participants.

Considering the totality of the circumstances, Dodson failed to establish that the lineup was impermissibly suggestive so as to create a substantial likelihood of misidentification. *Kurylczyk*, 443 Mich at 304-306, 311-312. The trial court properly allowed admission of testimony regarding the victim's pretrial and in-court identifications and it is not necessary to address whether an independent basis exists for the victim's in-court identification. Regardless, the record establishes that the witness had an independent basis for her identification. *Kurylczyk*, 443 Mich at 303. Dodson has not established error warranting relief.

III. JURY INSTRUCTIONS

Dodson next claims that the trial court erred by failing to give an enhanced instruction to the jury regarding factors affecting the reliability of an eyewitness identification. However, Dodson not only failed to request such an instruction or to object when the instruction was not given, his lawyer waived any error by affirmatively expressing his satisifation with the instructions as given. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

IV. UNLAWFUL SEARCH

Dodson next claims the trial court improperly admitted documents seized during a search of his residence because the affidavit supporting the search warrant failed to establish probable cause to believe that the items sought would be found at the place to be searched. Dodson did not preserve this issue for appeal by moving before the trial court to suppress the evidence seized in the search. *People v Snider*, 239 Mich App 393, 406; 608 NW2d 502 (2000). We review unpreserved issues for plain error. *Carines*, 460 Mich at 763.

Probable cause to search must exist at the time that a search warrant is issued. *People v Stumpf*, 196 Mich App 218, 227; 492 NW2d 795 (1992); MCL 780.651(1). "Probable cause for issuance of a search warrant exists if there is a substantial basis for inferring a fair probability that contraband or evidence of a crime exists in the location to be searched." *People v Malone*, 287 Mich App 648, 663; 792 NW2d 7 (2010). "Probable cause must be based on facts presented to the issuing magistrate by oath or affirmation, such as by affidavit." *People v Brown*, 297 Mich App 670, 675; 825 NW2d 91 (2012); MCL 780.653. "When reviewing a magistrate's decision to issue a search warrant, this Court must examine the search warrant and underlying affidavit in a common-sense and realistic manner." *Malone*, 287 Mich App at 663.

We initially note that the search warrant and affidavit are not contained in the lower court record; Dodson attached the search warrant and the supporting affidavit to his appellate brief. Although it is generally impermissible to expand the record on appeal, *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999), because the prosecutor does not contest the validity of the documents and fully briefed this issue, we exercise our discretion under MCR 7.216(A)(4) and consider the warrant and supporting affidavit.

Dodson asserts that the affidavit supporting the search warrant failed to establish probable cause for the magistrate to conclude that he had a connection to the house to be searched. The affiant stated that officers traced the motorcycle that was observed fleeing the scene of the robbery to Dodson. The affiant also provided that Dodson told an officer that, on the evening of the robbery, he arrived "home," observed his motorcycle and gear in the garage, showered, watched television, and went to bed, and the next morning his mother awakened him and told him the garage door was open and his motorcycle was gone, clearly linking his motorcycle to his "home." The affiant also noted that Dodson refused to give consent to search the home. Although the affiant did not directly state that Dodson lived at the residence to be searched, when read in its entirety in a "common-sense and realistic manner," *Malone*, 287 Mich App at 663, it states sufficient facts from which a reasonably cautious person could infer that Dodson and the motorcycle were sufficiently connected to the house to warrant a search. *Id.* The affidavit provided a substantial basis for inferring a fair probability that evidence of the robbery might be found at the residence. *Id*.

Dodson also contends that the officers could not lawfully seize the documents connecting him to the home because the search warrant did not specifically provide for their seizure. During the search, police officers did not recover the items specifically described on the warrant, i.e., the motorcycle, motorcycle gear, money, and the victim's possessions, but recovered Dodson's bank statement and paystubs as well as registration documents for the motorcycle. "The Fourth Amendment requires a warrant to particularly describ[e] the place to be searched, and the person or things to be seized." *People v Keller*, 479 Mich 467, 475; 739 NW2d 505 (2007) (quotation marks and citation omitted). However, the items, although not described on the warrant, were properly seized under the plain view exception to the warrant requirement, which "allows police officers to seize, without a warrant, items in plain view if the officers are lawfully in a position from which they view the item, and if the item's incriminating character is immediately apparent." *People v Champion*, 452 Mich 92, 101; 549 NW2d 849 (1996) (citations omitted). The incriminating character of the documents was apparent because they suggest that Dodson actually resided at the registered address of the motorcycle observed fleeing from the scene, which further links him to the motorcycle and the robbery. *Id.* at 101-102. Therefore, the officers could lawfully seize the documents.

V. INEFFECTIVE ASSISTANCE

Dodson lastly claims that he was denied the effective assistance of counsel at trial. Where, as here, the trial court did not hold an evidentiary hearing on the claim of ineffective assistance, this Court will limit its review to mistakes that are apparent on the record. *People v Gioglio (On Remand)*, 296 Mich App 12, 20; 815 NW2d 589 (2012), remanded for resentencing 493 Mich 864. "To establish a claim of ineffective assistance of counsel, the defendant must show that 'counsel's representation fell below an objective standard of reasonableness' under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 22 (citation omitted).

First, we conclude that Dodson's lawyer was not ineffective with regard to those issues previously addressed which also form the basis of his claim of ineffective assistance. The alleged instances of prosecutorial misconduct were not improper, making any objection futile, *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998), or likely did not affect the outcome of the proceedings, *Gioglio*, 296 Mich App at 22. Although we agree that the victim's identification testimony was crucial to the prosecution's case, Dodson's lawyer would not have been successful in suppressing the pretrial and in-court identifications given our conclusion that the record failed to demonstrate that the lineup identification was impermissibly suggestive so as to indicate a substantial likelihood of misidentification. *Kurylczyk*, 443 Mich at 302-303, 306, 311-312, 318. We also reject Dodson's argument that his lawyer was ineffective in failing to object to the court's jury instructions on identification or request an enhanced instruction on the reliablity of eyewitness identifications. We believe that the trial court's instructions adequately accounted for Dodson's theory of misidentification and sufficiently protected his substantial rights. *People v Kowalski*, 489 Mich 488, 501-502; 802 NW2d 200 (2011). Finally, in light of our conclusion that the search warrant affdiavit alleged sufficient facts from which the magistrate could reasonably infer that Dodson was connected to the residence to be searched, *Malone*, 287 Mich App at 663, defense counsel was not ineffective in failing to move to quash the search warrant and suppress the documents. *Fike*, 228 Mich App at 182.

Dodson's final claim of ineffective assistance, which he did not raise seperately, is that his lawyer failed to move to exclude or object to the statements that Dodson made on the grounds that they were not voluntary. "In general, statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Snider*, 239 Mich App at 416. A waiver is voluntary if "it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *People v Daoud*, 462 Mich 621, 635; 614 NW2d 152 (2000) (citations omitted). Our Supreme Court has set forth the following non-exhaustive list of factors for consideration in determining whether an accused's statement and waiver are voluntary:

> the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).]

"In order to establish ineffective assistance of counsel for failure to move to suppress a custodial statement . . . , the defendant must show that he or she would have prevailed on the issue." *People v Comella*, 296 Mich App 643, 652-653; 823 NW2d 138 (2012).[1]

Dodson argues that his statement given during a police interview was coerced. However, it is not apparent from the existing record that the statement was improperly obtained. Instead, in light of undisputed testimony indicating that Dodson was read his *Miranda* rights, he understood his rights, he chose to speak to the detectives, and the absence of any suggestion of coercion in the existing record, the record indicates that he understood his rights and voluntarily chose to speak. There is no evidence in the existing record to support his assertion that the detectives coerced him into waiving his rights.[2] Accordingly, Dodson failed to demonstrate that he would have prevailed if his defense counsel had moved to suppress his statement. *Comella*, 296 Mich App at 652-653.

Moreover, it is evident that defense counsel likely made a strategic decision not to pursue a motion to exclude the statement because Dodson denied committing the robbery during the interview. Defense counsel highlighted this fact at trial during his cross-examination of the interviewing detective and during closing argument. He also emphasized the fact that Dodson voluntarily spoke to the police officers—apparently to show that he was not trying to hide anything; his lawyer argued in closing: "we know for sure that he voluntarily talked to the police, he voluntarily waived his right to have an attorney, wasn't trying to hide something, we also know for sure that he denied he did it." Considering this record, defense counsel made a strategic decision not to move to exclude the statement so he could use it to Dodson's benefit. On this record, Dodson failed to overcome the strong presumption that counsel's assistance was sound trial strategy. *Gioglio*, 296 Mich App at 22-23. Dodson has not shown that defense counsel's performance fell below an objective standard of reasonableness, in failing to move to exclude the statement from evidence. *Id*. at 22.

Furthermore, even if his waiver were somehow defective, Dodson cannot show that the admission of the testimony concerning his police statement amounts to outcome determinative error. *Id.* Given the victim's identification of Dodson as the perpetrator and the evidence linking him to the motorcycle involved in the robbery, it cannot be said that there is a reasonable probability that, but for the alleged error, the result of the proceedings would have been different. *Id.* In fact, although parts of the statement were used to inculpate Dodson, his statement was, in a large respect, favorable to his case. He denied any involvement in the robbery, his statement also largely corroborated the testimony by his mother regarding his activities and whereabouts

[1] We note that Dobson included the DVD recording of his interview with his brief on appeal. The DVD recording was not admitted at trial and is not included in the lower court record. Therefore, we have not considered it. *Unger*, 278 Mich App at 253.

[2] Dobson specifically asserts that "the police assured him that he was not being charged with anything," explained that they could not talk to him without giving him his *Miranda* rights because he was being held under a parole detainer and so was in custody, and told him they did not know why his parole officer wanted to talk to him.

on the night of the robbery, and it supported his claim that the motorcycle was stolen from his garage.

For the same reason, we reject Dodson's claim that his trial lawyer failed to use his statement to support his defense. Dodson relies on the DVD recording, which is not properly before this Court. *Powell*, 235 Mich App at 561 n 4. Without considering the DVD recording, Dodson's assertions are unsupported by the record. In any event, on this record, we cannot conclude that Dodson's lawyer's use of the statement fell below an objective standard of reasonableness. *Gioglio*, 296 Mich App at 22.

There were no errors warranting relief.

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Kelly
/s/ Amy Ronayne Krause